

² Notably, this language has not changed since the most recent Guide was issued in April 2017. See www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf.

Board’s decision; (3) be accompanied by the amicus brief; and (4) comply with the filing requirements established in 29 CFR § 102.5. *Id.*; *see also* 29 CFR § 102.46. Finally, parties may reply to the motion or, after the Board has granted leave to file an amicus brief, file an answering brief on the merits. 29 CFR § 102.46. In its response to Amici’s motion for leave to file, the General Counsel does not contend that Amici violated any NLRB rules of procedure. Indeed, given the brief list of requirements for a motion established in the Guide and in 29 CFR § 102.46, there are very few rules of procedure that Amici could have violated. The rules require Amici to meet basic filing requirements, state their interest in the case, and state how the brief would benefit the Board’s decision. Amici fulfilled each of those requirements.

Rather than argue that Amici filed out of time, failed to properly serve the brief, or failed to comply with formatting requirements, the General Counsel attempts to argue that Amici have no interest in the case and that their brief would provide no benefit to the Board as it considers this issue. But in their motion, Amici specifically stated the bases of their interest and why they believed their brief would benefit the Board.³ Amici do not need to provide their full argument in their motion—that is what the amicus brief is for. Yet the General Counsel turns this procedural rule on its head, asserting that Amici do not have *enough* of an interest, and that their perspective did not offer *enough* insight to the Board. To support its claims, the General Counsel jumps to the merits of the brief, circumventing the requirement that it file a separate answer to the amicus brief after the Board grants leave to file. *See* 29 CFR § 102.46 (i)(4).

³ *See* Mot. for Leave to File Amici Curiae Br. of FDRLST Media, LLC Employees Emily Jashinsky and Madeline Osburn in Supp. of Resp’t, 2 (“Given their experiences, both as members of the press seeking to keep citizens well-informed and as employees working directly under Respondent, amici provide direct insight into the problem with the Charging Party’s position and the floodgates this claim could open.”).

Amici are two employees of Respondent, represented by independent counsel, who filed the brief and accompanying motion by their own volition. They each have an interest in how the outcome of this case affects their employer and, by extension, their workplace. They can provide unique, firsthand perspectives about their work environment and their relationship with their employer on Twitter.

Nothing in the NLRB's rules prevent employees from filing amicus briefs in support of their employer. Thus, the General Counsel's attempts to mischaracterize Amici's interest in the matter or the insight they can provide to the Board is simply a thinly veiled attack on the merits of the amicus brief. For example, the General Counsel states that granting Amici's motion would set a dangerous precedent in "run-of-the-mill cases" like this one. General Counsel's Opp'n to Mot. to File "Amici Curiae" Br. by Resp't Employees on Behalf of Resp't, 2. Referring to this case as "run-of-the-mill" is itself a legal conclusion about its merits. The General Counsel also contends that the basic First Amendment considerations Amici offer to the Board are of no use to the present case because "threats like the July 6, 2019 Tweet by . . . Ben Domenech are unprotected." *Id.* This is another legal conclusion about the merits of the case; in fact, whether Mr. Domenech's tweet was a threat is the core issue in this case. And finally, the General Counsel raises and dismisses new arguments that Amici themselves did not raise in either their motion or their brief. *See id.* at 3 ("[T]he proposed brief does not offer any argument that Respondent's Tweet constituted an exercise of the press. . . . But even if it had made that claim, it would have been readily dismissed.").

Amici refuse to engage in a debate on the merits of the case based on a motion for leave to file an amicus brief, particularly when the NLRB rules do not even require amici curiae to file such motions in the first place. The NLRB regulations already provide the General Counsel with an

opportunity to raise these arguments in an answering brief. *See* 29 CFR § 102.46 (i)(4). But because the General Counsel has gone to great lengths to respond to the merits arguments presented in the amicus brief, it should not be permitted a second bite at the apple through an answering brief.

For the foregoing reasons, Amici respectfully request that the Board grant the motion for leave to file and construe the General Counsel's opposition as an answering brief to the amicus brief. Amici also request that the Board strike or refuse to accept any surreply the General Counsel might be inclined to file by surreptitiously calling it an answering brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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